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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. [redacted]599

UNITED STATES OF AMERICA,
Respondent-Appellee,

v.

COUNTY OF WAYNE,
Petitioner-Appellant.

BRIEF OF AMICUS CURIAE, CITY OF DETROIT, AND STATE OF MICHIGAN, IN SUPPORT OF PETITION OF COUNTY OF WAYNE FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(For List of Attorneys see Inside Front Cover.)

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To: The Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

City of Detroit and State of Michigan, as *amicus curiae*, support the petition of the County of Wayne for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cause on June 14, 1967.

A. OPINIONS BELOW

The opinion of the United States Court of Appeals, Sixth Circuit, is unreported as of this date. A copy of the Judgment and Opinion of the Court is not attached hereto, being reported in Appendix B of the County of Wayne filed with this Court. The opinion of Honorable Fred W. Kaess, District Judge for the Eastern District of Michigan, is reported in 247 F. Supp. 84; the same is also attached to petitioner-appellant's petition as Appendix C.

B. JURISDICTION

This case arises from an action instituted by respondent-appellee in the United States District Court seeking to foreclose certain federal tax liens against a fund held by a trustee of the assets of an insolvent debtor executing a trust chattel mortgage for the benefit of creditors. Jurisdiction of such action was invoked by respondent-appellee under Title 28 U.S.C.A., Sections 1340 and 1345, and Title 26 U.S.C.A., Section 7402(a).

Jurisdiction of this Court to issue a writ of certiorari is conferred by Title 28 U.S.C.A., Sections 1254(1) and 2101(c).

C. QUESTIONS PRESENTED FOR REVIEW

1. Where tax debtor is insolvent, should an *ad valorem* personal property tax lien under Michigan law, which lien meets the test of choateness set forth in *U. S. v. New Britain,* 347 U.S. 81 (1954), 98 L. Ed. 520, 74 S. Ct. 367, and *U. S. v. Vermont,* 377 U.S. 351 (1964), 12 L. Ed. 2d 370, 84 S. Ct. 1267, and which said lien is capable of being summarily enforced without any assistance of the courts,

be considered specific, perfected and choate so as to be excepted from the application of Section 3466, Revised Statutes, (31 U.S.C.A. 191) notwithstanding the specificity rule set forth in *U. S. v. Gilbert Associates,* 345 U.S. 361 (1953), 97 L. Ed. 1071, 73 S. Ct. 701?

2. Is the principle of specificity enunciated in *U. S. v. Gilbert Associates, supra,* construing a New Hampshire tax law, applicable without exception to all the sovereign states, including Michigan, without requiring any review of the tax structure of each state to determine whether under its tax laws possession is necessary in order to perfect an *ad valorem* personal property tax lien?

D. QUESTION NOT PRESENTED FOR REVIEW

The existence of a judicial exception to the absolute priority rule of Section 3466, Revised Statutes (31 U.S.C.A. 191), excluding from its purview, specific, perfected and choate liens, has not been contested by the Federal government, and is not presented herein for review.

E. STATUTES INVOLVED

The statutory provisions connected with the issues are referred to below. Being too lengthy to set forth here in full, the pertinent text appears in Appendix A attached hereto.

Michigan Statutes Annotated:

Sec. 7.1 (C.L. 1948, Sec. 211.1)
Sec. 7.81 (C.L. 1948, Sec. 211.40)
Sec. 7.83 (C.L. 1948, Sec. 211.42)
Sec. 7.87 (C.L. 1948, Sec. 211.44)
Sec. 7.91 (C.L. 1948, Sec. 211.47)

Section 3466 Revised Statutes:

(31 U.S.C.A. 191)

F. STATEMENT OF THE CASE

The matter here presented involves an appeal of the case brought by respondent-appellee to foreclose certain federal tax liens against the funds held by a trustee under a trust chattel mortgage executed by an insolvent tax debtor for the benefit of creditors. In addition to the trustee and the tax debtor, the following parties were named defendants in the subject action: County of Wayne, Michigan Corporation Securities Commission, Michigan Department of Revenue, and Michigan Employment Security Commission. The latter named agencies of the state did not participate in the arguments before the District Court since the claim of liens possessed by each were patently junior to the liens claimed by the United States and the County of Wayne, and the funds in the hands of the trustee admittedly were not sufficient to pay all lien claims in full. A motion of the City of Detroit to intervene in the action pending before the trial court was denied; however, the court did permit the City to file brief *Amicus Curiae.* The Court of Appeals subsequently permitted the City to file *Amicus Curiae* brief with leave to participate with the County in the oral arguments before that Court. The Court of Appeals also permitted the State of Michigan to file Brief *Amicus Curiae.*

G. REASONS FOR GRANTING WRIT

The issue involved in this case is of great importance not only to the local taxing units of the State of Michigan but also to the taxing units of other states whose claim of liens are supported by statutes which are significantly at variance with the New Hampshire tax laws discussed by the court in *U. S. v. Gilbert Associates,* 345 U.S. 361 (1953),

97 L. Ed. 1071, 73 S. Ct. 701. The granting of this writ is further made necessary by the fact that the Supreme Court of the State of Michigan held in the case of *In re Ever Krisp Food Products Co.*, 307 Mich. 182, 212, 11 N.W. 2d, 852, 862 (1943) that the *ad valorem* personal property tax liens of the City of Detroit and the County of Wayne were specific and choate since "No further process of law or court proceeding was required to determine the amount, or to complete the fixing of the lien, on the respective dates referred to in the City Charter and in the statute law. * * *"

Since both the trial court and the Court of Appeals did not make any attempt in this case to distinguish the Michigan tax statutes from the tax statutes of New Hampshire involved in the Gilbert Associates case, a review by this court is necessary and essential in order to determine if possession is required in the light of the Michigan Supreme Court's holding in the Ever Krisp case that an *ad valorem* lien for personal property taxes in Michigan is specific, perfected and choate, and as such is excepted from the application of Section 3466, R.S.

If specificity requires possession, as the federal government contends, and possession is an impossibility as in *U. S. v. Crest Finance Co.* (1961—7th Cir.) 291 F. 2d 1, is the arbitrary adoption of such principle justified here in view of the state court's pronouncement that the statutory provisions of the Michigan lien law do not require possession to establish choateness of *ad valorem* liens. While that case did not involve insolvency, nevertheless, the impossible situation created there by the strict enforcement of the specificity rule was recognized by the federal government to the extent that it conceded on appeal that the lien of petitioner (Crest) was choate. *Crest Finance Co. v. U. S.*, 368 U.S. 347 (1961) 7 L. Ed. 2d 342, 82 S. Ct. 384.

CONCLUSION

A lien is what the statute makes it. Under Michigan law, an *ad valorem* lien for personal property taxes arises by operation of law and continues until the taxes have been paid in full. *C.L. of 1948,* Sec. 211.40, (Stat. Ann., Sec. 7.81). Excepted from the absolute coverage of the lien are items of personalty sold in the usual course of business. *C.L. of 1948,* Sec. 211.40, (Stat. Ann., Sec. 7.81). When the taxes secured by the lien are not paid within the time provided by statute, the lien is enforceable administratively by levy and distraint without requiring any assistance of the courts. *C.L. of 1948,* Sec. 211.47, (Stat. Ann., Sec. 7.91). The amount of the tax assessment secured by the lien is definite and certain. *C. L. of 1948,* Sec. 211.42, (Stat. Ann., Sec. 7.83); *C.L. of 1948,* Sec. 211.44, (Stat. Ann., Sec. 7.87).

A reading of the foregoing provisions of the Michigan statutes establishes the choateness of the *ad valorem* personal property tax lien of the County of Wayne. The requirement of specificity by possession with respect to local tax lien claims competing with Federal tax claims asserting priority under Sec. 3466, R.S. is unreasonable, unwarranted and not within the Congressional intent manifested at the time the priority statute was enacted. Such specificity requirement would tend to create different standards of choateness; this would bring about a state of confusion and uncertainty among the taxing units of the various states. Adherence of the choate standard laid down in *U. S. v. New Britain, supra,* and *U. S. v. Vermont, supra,* would bring about a more harmonious approach to the vexing problems faced by the various units of government in the collection of tax revenues.

The State of Michigan is also concerned with its ability to utilize collection procedures short of seizure of a taxpayer's property in order to help the taxpayer continue in business and with a change in the working relations between various tax lien claimants in the State of Michigan. To date the various taxing agencies, including the federal government, have recognized as a fair and equitable principle that of "first in time, first in right," as pertains to *bona fide* liens. The state is also concerned with the requirements that personal property be reduced to possession to protect a tax lien that is otherwise perfected under the state law inasmuch as such a rule could give way to the rule of force as the controlling legal principle.

Therefore, *amicus curiae* believe that the writ of certiorari prayed for by the County of Wayne should be granted.

Respectfully submitted,

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